

PM

December 6, 2004

Art Hayes Jr.  
The Brown Cattle Co.  
PO Box 517  
Birney, MT 59012

Surface Transportation Board  
Case Control Unit  
Washington, DC 20423  
Attn: Kenneth Blodgett  
STB Docket No. FD 30186 (Sub-No. 3)

Re: The Brown Cattle Co.'s Comments on STB's Tongue River III DSEIS

Dear Mr. Blodgett:

Thank you for the opportunity to review and provide comments to the Draft Supplemental Environmental Impact Statement (SEIS) concerning the construction and operation of the proposed Tongue River Railroad - Western Alignment.

I am a rancher with property affected by the proposed Tongue River Railroad. The Brown Cattle Co. will have about five miles of the Tongue River Railroad crossing its private and leased lands. I have lived in the area for sixty years and rely on the ranch for my family's continued livelihood. The environmental well-being and natural resources in the Tongue River Valley are vital to my ranch and to my community, and I believe that the Proposed Action will damage both.

I am deeply concerned about the effects that the Proposed Western Alignment described in the Tongue River III Draft Supplemental Environmental Impact Statement (DSEIS) and the proposed realignment to the Tongue River I and Tongue River II projects will have on the environment of the Tongue River Basin and the related communities including my ranch. This letter serves as an expression of my concern both about Tongue River III and the sufficiency of the DSEIS in reviewing all relevant matters, including the re-opening of only portions of Tongue River I and II. Relying on EIS' completed in 1986 and 1996 as the basis for some of the Board's actions have provided incomplete data at best. I am also deeply concerned about the lack of enforceable measures included in this DSEIS. Allowing the railroad to move ahead without an in-depth study of the environmental and economic impacts as well as the lack of any enforcement

mechanisms if the railroad does not undertake the actions recommended by the Board are unacceptable in my view.

Understanding that the Board is committed to ensuring the safety and environmental soundness of our home, I respectfully urge the Board to complete a new environmental analysis of the entire line before any action, including this Proposed Action be approved by the board. I also respectfully urge the Board to strengthen their oversight of the railroad to include tangible enforcement mechanisms to ensure that the Board's recommended mitigation measures are met to the letter of the law.

**I. THE PROPOSED ACTION NEGATIVELY AFFECTS THE TONGUE RIVER AND THE TONGUE RIVER RESERVOIR.**

We rely on the water of the Tongue River and Tongue River Reservoir for irrigation and other ranch uses, including that of the health and well being of our livestock. The Proposed Action would actually bring the rail line closer to the River than of the originally approved Tongue River II route. The increase in sedimentation in the river as a result of the Western Alignment could impair the water used on my ranch. The new route would increase the number of non-perennial stream crossings, nearly double the volume of earth moved (by seven million cubic yards) and double the potential increase in sediment load (tons/year) in the Tongue River. Much of the soil and rock that will make up the cut and fill of the Tongue River Railroad's bed contains high amounts of sodium. Sodium is highly water soluble and toxic to plants and aquatic life. Rain and snow run-off from the rail bed will greatly increase the amount of toxic salt in the Tongue River—The river that we rely on for irrigation water.

The State of Montana, recognizing the present water quality problems of the Tongue River, has assigned TMDLs to prevent further deterioration of water quality and to improve the hydrology of the Basin. Despite the recognition that the Tongue River watershed needs improvement, the SEA recommends approval of a project that it concludes would "increase[] sediment loads and suspended solids due to (1) active construction in waterways during installation of bridges and culverts; (2) changes in surface water patterns and shallow aquifer flow patterns due to topographic and drainage-pattern changes (e.g. cut and fill and the crossing of drainages); and (3) the temporary effects of water consumption for dust suppression." DSEIS 4-108. The Tongue River Water Users Association has a water marketing contract with the State of Montana for agricultural water. There is only seventy-five acre feet of industrial water in the Tongue River Reservoir and that is used by Decker Coal for dust control. In the 2004 water year the members of the Tongue River Water Users Association only received forty-eight percent of their contract water because of continuing drought conditions. The use of water by the railroad would greatly increase this hardship.

The Western Alignment would clearly threaten the Tongue River. The SEA concedes that the Proposed Action would increase sedimentation, increase the potential for toxic spills, and cause slumping on the canyon walls. DSEIS 4-99, 4-105 – 4-108. By choosing the Proposed Action, which travels along the Tongue River, the STB has endangered the river. The DSEIS suggests that the construction of the Western Alignment will require substantially more water use during the peak irrigation season (a season during which the River already has a low water level) than the alternative actions. DSEIS 4-115. While the SEA concludes that this will not affect water availability, the DSEIS does not contemplate the change in water quality during this period nor does it provide any site-specific analysis as to flow levels at various points along the river. In fact, while the SEA acknowledges that the Western Alignment crosses more non-perennial streams than other alternatives it provides no analysis as to how the project will affect those streams. DSEIS 4-28. Before approving the Proposed Action, I respectfully request that the Board require a site-specific survey of the impacts of the proposed Western Alignment on the feeder non-perennial, ephemeral and intermittent streams it will cross.

I am also concerned that the DSEIS does not adequately evaluate the changes in the water quality and drainage in the Tongue River Basin since the Tongue River I and II EISs were completed. It appears that the extent of the analysis is a notation that the new alignment will be further from the river and thus “the proposed Tongue River I and Tongue River II alignment would not affect the normal variations in streamflows that occur in the Tongue River Valley and that no mitigation is required to address variations in streamflows.” DSEIS 5-15. The effects of site-specific location changes in alignment should be evaluated before approval – while distance on a map may appear to indicate less of an impact, this is not necessarily indicative of the change’s impact to the Tongue River. Site-specific hydrology corresponding with the changes in the alignment must be addressed. Before approving the Proposed Action, I respectfully request that the Board require a site-specific survey of the impacts of the entire Tongue River Railroad project on the Tongue River and Reservoir.

The DSEIS assumes away many of the potential harms, which are not quantified or specified, by offering mitigation measures to protect the river. It is hard to understand how the DSEIS can make such assumptions, based on little to no quantitative research. It is also hard to understand how the Board can be assured these mitigation measures will ensure that the railroad will ensure the safe conduct of the environment and our lands when these mitigation measures have no enforcement mechanisms included in them. It is also hard to understand how the SEA assumes that the mitigation measures will be effective without specifying how they will be effective. The language of the Mitigation Measures is clearly unenforceable in its current state. Mitigation Measure 49 is described as a mechanism to protect non-perennial streams at railroad crossings by the installation of culverts. SEA states “if imposed and implemented, this mitigation measure would ensure that the impacts resulting from the construction of culverts... would not

be significant.” DSEIS 4-114. Not only is there no analysis as to how this would be effective, the plain text indicates that implementation and enforcement is questionable.

While cognizant of the many mitigation measures that the SEA lists in the DSEIS, I am concerned that no mechanism to enforce the mitigation measures exists. Even if enforced, there is little discussion in the DSEIS of the efficacy of the mitigation measures with respect to the ensuring that the River remains clean. Without more research, data and analysis on the impact of the Western Alignment to Tongue River Basin, or on the efficacy and impact of the mitigation measures it appears inappropriate to approve the Proposed Action. Before approving the Proposed Action, I request that the Board require analysis which quantifies and specifies the site-specific environmental damage to the river, and describes the enforcement mechanism for the various mitigation measures and how those mitigation measures will work given the specific hydrology of the Tongue River Basin.

## **II. THE PROPOSED ACTION ECONOMICALLY HARMS OUR AREA AND NEGATIVELY AFFECTS THE SAFETY OF THE LOCAL RESIDENTS**

As a resident of the Tongue River Basin I am also concerned about the effects of the Railroad on my community. Many of the properties in the region, The Brown Cattle Co. lands, are used for agricultural purposes including grazing of cattle. The Railroad will sever about one third of my property from the rest of my property, which makes grazing cattle difficult as we must then herd the cattle through a tunnel underneath the railroad. This process is time consuming and dangerous to the cattle. It will also force the deer and elk to cross the railroad to get to water and their feeding grounds. Again, there is apparently no recourse for landowners if the railroad decides against building a cattle tunnel. Before approving the Proposed Action, I respectfully request that the Board require an analysis of the effect of severing rancher's grazing lands and include enforcement mechanisms and official recourse for us if the railroad does not undertake the actions requested by the Board.

I continue to be deeply concerned that the SEA's analysis of the economic effect of the railroad to be short sighted and unbalanced. The DSEIS is very thorough in its analysis of how building the railroad will benefit the railroad company and increase employment in Sheridan, Wyoming. It is, however, utterly void of analysis of the negative economic effects the Proposed Action will have on the local community, ranchers, farmers and residents near the railroad. I respectfully request that the Board do an in-depth analysis on what the economic harm will be to the ranchers and others in the area by the railroad before it is finally concluded by the Board that it will be a boon to our area.

The railroad brings a number of dangers with it as well. Railroad lines, as the SEA acknowledges, spread noxious weeds to the lands they cross and are more likely to start wildfires

along their path. DSEIS 4-65. The State of Montana Water Resource Division has also noted their concern for this issue in their filing as well. STB Docket No. FD 30186 (Sub-No.3) November 30, 2004 filing. The DSEIS addresses the wildfire issue by describing potential mitigation measures but does not quantify the risk of wildfires, which I understand to be great. In fact, the SEA only provides percentage risks of fires compared to other sources of fire, but does not provide the needed analysis for accurate public evaluation – how many fires can the Tongue River Basin expect as a result of the Proposed Action? DSEIS 4-65. The SEA suggests that the average railroad fire consumes 90 acres as if this were not a significant risk. *Id.* A 90-acre burn can be a tremendous loss to a rancher and is an extreme danger to cattle. The DSEIS fails to evaluate whether local conditions suggest larger or smaller fires or whether the 90-acre size is appropriate for the Basin. Before approving the Proposed Action, I respectfully request that the Board require an analysis of the actual likelihood of fire and noxious weeds by this railroad in this canyon and to require an explanation of how the mitigation measures will actually prevent fire and the spread of noxious weeds.

Another significant concern is the risk that increased railroad crossings brings to the community. With trains rumbling across roads (both public and private) more than once an hour, delays are inevitable. This is particularly troublesome with regard to emergency vehicles and is an additional burden on the state and local community to provide the critical service to our area. The SEA acknowledges this concern but suggests that the delays may be minor. Yet, time resulting from these delays can be the difference between life and death in an emergency situation. Moreover, there will be an increase in traffic during construction of the railroad, as numerous workers will be traveling on local roads. The mitigation measures clearly have not taken into consideration the health and welfare of those of us who have lived in this area for generations and are completely inadequate. The SEA suggests that “contractors will be asked to provide central transportation to the work site” and that speed limits would be strictly enforced. DSEIS 4-88, 4-129. Yet, there is no discussion of how these measures will be enforced.

Moreover, the environmental justice analysis lacks a thorough discussion about how low-income local residents are hurt proportionately more by the Proposed Action. Also missing from the DSEIS is how the high level of airborne dust and particulate matter as a result of the Western Alignment will affect the health of cattle to which this community’s livelihood is tied.

### **III. STB’S ANALYSIS OF THE ENVIRONMENTAL IMPACTS OF THE WESTERN ALIGNMENT VIOLATES THE NATIONAL ENVIRONMENTAL PROTECTION ACT.**

The analysis of environmental impacts of the Proposed Action in the DSEIS is inadequate as it fails to take the requisite “hard look” at the Proposed Action’s effect on the

environment, Tongue River ranches and the Tongue River community. It appears that the DSEIS relies heavily on the Tongue River I and Tongue River II EISs to discuss potential impacts, but only addresses effects of realignment in Tongue River I or Tongue River II and the proposed Western Alignment in general terms. NEPA requires more than general statements. *Cuddy Mountain v. U.S. Forest Service*, 137 F.3d 1372, 1379-80 (9th Cir. 1998). Moreover, the DSEIS suggests that the fishery analysis is self-avowedly incomplete – the DSEIS must do more than identify potential environmental impacts, it must establish the magnitude and intensity of the impact. *National Parks & Conservation Association v. Babbitt*, 241 F.3d 722, 743 (9th Cir. 2001).

SEA's reliance on the 1986 and 1996 Tongue River I and II proposals is inappropriate. The analysis in the underlying environmental impact statements for Tongue River I and Tongue River II proposals, which were relied upon by the STB in the present DSEIS, is clearly outdated. Concluding that virtually nothing had changed since 1986, SEA conducted only a "focused review" of its prior EISs and addressed only changes in the proposed project. *See, e.g.*, DSEIS at 3-6 to 3-7; DSEIS at 3-9. Yet, SEA's conclusion that nothing has changed appears unreasonable and contrary to the facts. It is hard to understand how the SEA can assume that environmental conditions have not changed in the 10-20 years since the original EISs were completed. SEA offers only conclusory statements in support of its reliance on the previous EISs. *See* DSEIS at 3-7 ("SEA's analysis of environmental circumstances and environmental regulations and laws determined that little has changed since the EIS was prepared for Tongue River I."). The DSEIS should be supported by evidence that the agency has made the necessary environmental analysis. *See* 40 C.F.R. § 1502.1; *Citizens Against Toxic Sprays, Inc. v. Bergeland*, 428 F. Supp. 908 (D. Ore. 1977). The Tongue River III comparison between current conditions and conditions at the time of each of the previous EISs focuses chiefly on aerial photography comparisons, website searches and agency discussions as well as extremely limited site visits and does not adequately evaluate potential differences. *See, e.g.*, DSEIS at 3-6 to 3-7; 3-9.

SEA's reliance on Tongue River I and Tongue River II has led it to ignore or fail to adequately discuss:

- New baseline conditions. *See, e.g.*, 40 C.F.R. § 1502.15; *Half Moon Bay Fisherman's Marketing Ass'n v. Carlucci*, 857 F.2d 505, 510 (9th Cir. 1988).
- "Reasonably foreseeable development," which also has changed dramatically since 1986. *See, e.g.*, 40 C.F.R. §§ 1508.7; 1508.8; 1502.1.
- Changes in current area activities, resulting in changes to direct, indirect and cumulative impacts. *See, e.g.*, 40 C.F.R. §§ 1508.8; 1508.7, 1502.1.
- Changes in the environment and resources subject to the project's impacts (e.g., changes in endangered, threatened and sensitive species, changes in air and water quality, etc.). *See, e.g.*, 40 C.F.R. §§ 1508.8; 1508.7, 1502.1.

- A “no action alternative.” The DSEIS does not separately address the no action alternative but relies completely on the old EISs in violation of NEPA. *See* 40 C.F.R. § 1502.14(d).

These issues should be fully addressed in the DSEIS. Without this information it is difficult for the public to fully and fairly evaluate the proposed action and the analysis of the DSEIS.

Despite the DSEIS’ reliance on the Tongue River I and Tongue River II EISs, the DSEIS is silent on why a proposal nearly identical to the present Proposed Action was rejected in Tongue River II in favor of the Four Mile alternative. It cannot be because conditions have changed since that EIS was prepared – the SEA suggests a new analysis of the entire line is not needed precisely because environmental conditions have not changed. There is no analysis as to why the economic reasons touted by the SEA as justification for the Western Alignment were absent in 1996 when it rejected the railroads preferred alternative – a proposal nearly identical to the Western Alignment. The SEA has not provided any explanation on this obvious contradiction and it is difficult to understand why they have completely avoided this issue in an apparently arbitrary manner.

By evaluating the proposed railroad in three stages, the SEA has effectively segmented the project in violation of NEPA. SEA conducted three separate EISs, at three very different times, covering separate areas and aspects of the project. Because SEA failed to update the old EISs or cumulatively analyze the impacts of the three segments of the project, SEA’s analysis contravenes NEPA’s requirements. Indeed, the wisdom of the prohibition against segmenting is evident here. In the present situation, the project has changed dramatically over 20 years with no systematic evaluation of the entire project. If STB does approve the Proposed Action, the Tongue River Railroad will have been effectively approved without a systematic environmental review and is in direct violation of NEPA requirements.

NEPA requires the government agency conducting the environmental review to fully evaluate and quantify the effects of mitigation measures. Not only is that analysis absent from the DSEIS, the DSEIS is silent as to enforcement mechanism other than the goodwill of those constructing the railroad. NEPA requires more. *See, e.g., Neighbors of Cuddy Mountain v. U.S. Forest Service*, 137 F.3d 1372, 1380-81 (9th Cir. 1998); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 352 (1989). Without this mitigation analysis, the public will not have adequate tools to evaluate the project.

As expressed above, I have serious reservations about the impact of the Proposed Action on the Tongue River Basin environment, my ranch and my community. The analysis provided in the DSEIS appears perfunctory and overly limited in scope, leading, in my opinion, to a DSEIS

Surface Transportation Board

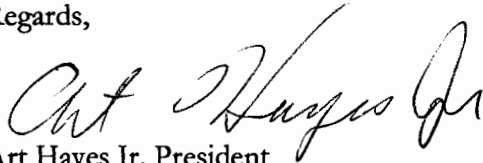
December 6, 2004

Page 8

that violates the spirit and letter of NEPA. I respectfully request that the Board require a complete study and analysis of the concerns I have raised and require that a new environmental impact study be conducted on the entire railroad line in order to adequately understand the true impacts of the railroad in our community.

I thank the Board for its review and response of these issues as well as the Board's concern and focus that the impacts of the railroad on a community that we have lived in for over sixty years be addressed in a clear and focused manner. There are many complex issues associated with this proceeding, and I appreciate the Board's understanding of the depth and breadth of these impacts.

Regards,

A handwritten signature in cursive script, appearing to read "Art Hayes Jr.", written in dark ink.

Art Hayes Jr. President  
The Brown Cattle Co.  
PO Box 517  
Birney, MT 59012